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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0813**

In the Matter of the Welfare of: T. D. B., Child

**Filed November 27, 2017
Affirmed
Larkin, Judge**

Steele County District Court
File No. 74-JV-16-1863

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant T.D.B.)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Daniel McIntosh, Steele County Attorney, Laura E. Isenor, Assistant County Attorney, Owatonna, Minnesota (for respondent State of Minnesota)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's order certifying his two third-degree criminal-sexual-conduct charges for adult prosecution under Minn. Stat. § 260B.125 (2016). He argues that because he is a low-risk juvenile with no prior delinquency or

programming history, the district court abused its discretion by ordering certification. We affirm.

FACTS

On September 9, 2016, respondent State of Minnesota filed a juvenile delinquency petition charging appellant T.D.B., born September 25, 1997, with two counts of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2014). The complaint alleges that when T.D.B. was 17 years old, he sexually penetrated his cousin, T.R., on two occasions in July and August 2015. T.R. was 14 years old at the time of the alleged offenses. T.R. described her relationship with T.D.B. as closer than cousins, more like a sibling relationship.

The first alleged assault occurred in a remote area, in a vehicle driven by T.D.B., off of a gravel road, far from any houses. T.R. alleges that T.D.B. undressed her and penetrated her with his fingers and penis. T.R. reported that she was in shock and unable to move, and that the car doors were locked. The second alleged assault occurred after T.R. reached out to talk to T.D.B. about what had happened. T.D.B. picked up T.R. and drove to a parking lot. T.R. suggested that they go to the home of one of T.D.B.'s parents. Instead of complying, T.D.B. drove T.R. to a remote area and again penetrated T.R. with his penis after she tried to resist. T.D.B. admitted to T.R.'s mother that he had sexual intercourse with T.R. on two occasions.

On September 21, 2016, the state moved to certify the proceeding for prosecution under the laws and court procedures controlling adult criminal violations. On April 25, 2017, the district court held a hearing on the certification motion. At the time of the

hearing, T.D.B. was over 19 years old. The state called one witness, Dr. Gary Hertog. The defense did not call any witnesses, but it submitted a psychosexual assessment prepared by Marie Grace, MA, LMFT.

Dr. Hertog has a master's degree in counseling psychology and a doctorate in clinical psychology. He was the director of the juvenile sex-offender program at MCF-Red Wing for seven years. He has been conducting sex-offender evaluations for 18 years, and he has been treating sex offenders for 23 years. He is also a licensed psychologist. Dr. Hertog testified that certification was appropriate because T.D.B. would not receive supervision adequate to ensure public safety without it. Dr. Hertog based his recommendation for certification, in part, on T.D.B.'s need for targeted treatment. He opined that a treatment program focused on appropriate sexual boundaries would not be adequate to address T.D.B.'s needs if T.D.B. had committed the penetration offenses, because such programming would not address the cognitive disorders that allowed T.D.B. to commit the offenses.

Grace is a partner in Skipped Parts LLC, an agency that provides assessment and clinical services for individuals "who have committed sexual offenses or engaged in harmful or problematic sexual behaviors." Grace has a master-of-arts degree in marriage and family therapy and is a licensed marriage and family therapist. She has worked with sex offenders for over three years.

Grace recommended that T.D.B. complete a 20-week program addressing appropriate boundaries and a full-day "Healthy Sexuality Workshop" offered by Skipped Parts LLC. Grace's assessment did not indicate whether one-on-one therapy would be

appropriate for T.D.B. or whether supervision after treatment would be beneficial to ensure that T.D.B. implements skills gained in treatment. Grace did not render an opinion regarding the timeframe necessary for T.D.B. to successfully complete treatment or whether the proceeding should be certified. The district court noted that if “Grace did any testing with regard to assessing [T.D.B.’s] risk to reoffend sexually, that information was not included in her report.”

On April 26, 2017, the district court certified the proceeding for adult prosecution. T.D.B. appeals.

D E C I S I O N

“When a child is alleged to have committed, after becoming 14 years of age, an offense that would be a felony if committed by an adult, the [district] court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations.” Minn. Stat. § 260B.125, subd. 1. A presumption in favor of certification exists when “the child was 16 or 17 years old at the time of the offense” and “the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the sentencing guidelines and applicable statutes, or that the child committed any felony offense while using, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm.” Minn. Stat. § 260B.125, subd. 3.

The underlying charges are severity level D offenses, and the presumptive sentence for each offense is a stayed 36-month prison sentence under the Minnesota Sentencing

Guidelines. Minn. Sent. Guidelines 4.B (Supp. 2015); Minn. Sent. Guidelines 4.B (2014).¹

The state does not allege that T.D.B. used a firearm during either offense. Thus, the presumption of certification does not apply, and the district court could order certification only if the state proved “by clear and convincing evidence that retaining the proceeding in the juvenile court does not serve public safety.” Minn. Stat. § 260B.125, subd. 2(6)(ii).

In determining whether public safety is served, courts must consider

- (1) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim;
- (2) the culpability of the child in committing the alleged offense, including the level of the child’s participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines;
- (3) the child’s prior record of delinquency;
- (4) the child’s programming history, including the child’s past willingness to participate meaningfully in available programming;
- (5) the adequacy of the punishment or programming available in the juvenile justice system; and
- (6) the dispositional options available for the child.

Minn. Stat. § 260B.125, subd. 4. In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the child’s prior record of delinquency than to the other factors. *Id.*

If the prosecution fails to demonstrate that public safety is best served by certification, the district court may designate the proceeding an extended jurisdiction

¹ Given the offense dates, each offense is governed by a different version of the sentencing guidelines.

juvenile (EJJ) prosecution. Minn. Stat. § 260B.130, subd. 1(1) (2016). Although a juvenile court’s jurisdiction over a delinquent child normally terminates when the individual becomes 19, “the jurisdiction of the court over an [EJJ] . . . extends until the offender becomes 21 years of age.” Minn. Stat. § 260B.193, subd. 5 (2016). If an EJJ prosecution results in a guilty plea or finding of guilt, the district court “shall impose one or more juvenile dispositions . . . and impose an adult criminal sentence, the execution of which shall be stayed on the condition that the offender not violate the provisions of the disposition order and not commit a new offense.” Minn. Stat. § 260B.130, subd. 4 (2016).

A district court has considerable latitude in deciding whether to certify a case for adult prosecution. *In re Welfare of S.J.T.*, 736 N.W.2d 341, 346 (Minn. App. 2007), *review denied* (Minn. Oct. 24, 2007). An appellate court

review[s] the juvenile court’s decision to certify [a proceeding] to adult court for an abuse of discretion . . . [Appellate courts] will not disturb a finding about whether public safety would be served by retaining the proceeding in juvenile court unless it is clearly erroneous. In determining whether the juvenile court’s findings are clearly erroneous, [appellate courts] view the record in the light most favorable to the juvenile court’s findings.

In re Welfare of J.H., 844 N.W.2d 28, 34-35 (Minn. 2014) (citation omitted). On appeal from a certification order, this court presumes that the factual allegations in the delinquency petition and the charges against the juvenile are true. *In re Welfare of U.S.*, 612 N.W.2d 192, 195 (Minn. App. 2000).

In challenging the district court’s certification order, T.D.B. attacks the credibility of Dr. Hertog and the district court’s weighing of the evidence, and he asserts that the

district court failed to place the burden of proof on the state. T.D.B. argues that “[t]he state cannot be found to meet its burden by clear and convincing evidence when a court merely ‘balances’ the factors” and that the district court “failed to specify how public safety would be at risk if [T.D.B.] were an EJJ.”

The district court found that four of the six public-safety factors favor certification. As to the first factor, the district court found “[t]he seriousness of the charged offense strongly weighs in favor of adult certification.” The district court based this determination on the nature of the charges, which involved “an abuse of a position of trust and of a familial relationship, which generally is considered to have a significant impact on a victim.” The district court also reasoned that the second incident “is alleged to have occurred when [T.R.] tried to reconcile the past relationship with the first criminal actions.” The district court found that these two circumstances weigh “heavily in favor of certification.”

The district court concluded the second factor, T.D.B.’s culpability, also weighs in favor of certification. The district court reasoned that T.D.B. admitted “to having sexual intercourse on two occasions with a fourteen year old. That he had a condom with him on the first occasion indicates a certain amount of planning, as does his alleged behavior in driving [T.R.] out into the country, away from any people who could help.” The district court found no mitigating factors to diminish T.D.B.’s culpability and determined that his culpability weighs in favor of certification.

As to the third factor, the district court weighed T.D.B.’s lack of delinquency history against certification. However, the district court noted T.D.B.’s admission to Dr. Hertog

that he drank alcohol while on conditional release for the underlying offenses, which was a violation of his court-ordered condition of release requiring law-abiding conduct. The district court expressed concern that T.D.B. “thinks nothing of committing underage consumption while on pre-trial release, as this may reflect criminogenic thinking.”

The district court also weighed the fourth factor against certification. The district court noted that T.D.B. had programming for mental health concerns and that he was recommended for medication for depression and anxiety. He also had counseling related to growing up with an alcoholic parent. The district court concluded, “This factor weighs in favor of retaining the case in juvenile court.”

The district court addressed the fifth factor, the adequacy of punishment or programming available in the juvenile justice system, in conjunction with the sixth factor, the dispositional options available for the child. The district court determined that “[t]he lack of evidence in the record of adequate punishment and programming options in the juvenile system compared to the adult system weighs in favor of certification.” In doing so, the district court compared the punishment and treatment available in the adult and juvenile systems, as well as the amount of time that would likely remain for supervision if the juvenile court retained jurisdiction for an EJJ prosecution. Here, the court emphasized its primary concern: there would not be enough time for adequate punishment and programming in the juvenile system under an EJJ disposition.

The district court reasoned:

As of the date of this order, [T.D.B.] has less than 17 months before his 21st birthday. At best, it will be several weeks before the matter is tried; if there is a conviction, there will be

additional delay before the sentencing is concluded, as a presentence investigation takes weeks to complete.

Realistically, if [T.D.B.] is found responsible for either or both charges in this case, once sentenced he would have a maximum of thirteen months of treatment and supervision.

The district court further reasoned that 13 months of supervision was “insufficient punishment, if it can fairly be considered punishment at all, for two sexual assaults perpetrated against [T.R.] on a deserted country road, by someone whom the child trusted, looked up to, and respected.”

The district court also reasoned that “thirteen months is . . . an insufficient amount of time under supervision to ensure public safety through the monitoring of [T.D.B.’s] use of knowledge and skills gained in treatment,” noting that “Dr. Hertog’s credible testimony amply supports [this] finding.” In doing so, the district court rejected T.D.B.’s argument that “this is merely an inappropriate boundary case that can easily be addressed by a twenty-week education program,” along with Grace’s recommendation for such a program. The district court noted that Grace did not accept the allegations against T.D.B. as true, which the district court was required to do. The district court also noted that Grace’s “‘psychosexual’ assessment apparently did not include any tools specific to sexual behavior or deviancy. The conclusions were based largely on what [T.D.B.] chose to share with the evaluator.” The district court ultimately determined that Grace’s “recommendations do not adequately address the needs of [T.D.B.] if he is guilty of either of the charged offenses.”

Based on the lack of adequate time for treatment under an EJJ disposition, the district court found that the sixth factor weighed in favor of certification. It explained that

[i]t is imperative for public safety, as well as for [T.D.B.] personally . . . that [T.D.B.] have adequate time to develop therapeutic relationships and fully complete all necessary treatment. Because . . . there is inadequate time in the juvenile system to accomplish this, this factor weighs in favor of certification.

Having found that four out of six factors favored certification, the district court concluded:

Balancing all of the factors, the Court finds the State has met its burden of establishing that keeping [T.D.B.'s] case in juvenile court under extended jurisdiction would not serve public safety. The seriousness of not one but two criminal sexual conduct offenses, his culpability, and the limited punishment and length of supervision available under an [EJJ prosecution] all weigh in favor of certification in spite of [T.D.B.'s] lack of history in the juvenile system and possible amenability to treatment.

T.D.B. argues that the district court “failed to properly analyze the evidence in light of the state having the burden of proof.” The record refutes that argument. The district court acknowledged that the state had the burden of proof, and the district court explained why the state had shown that T.D.B.'s lack of delinquency record and minimal programming history were outweighed by the other factors. Simply put, time worked against T.D.B. He was approximately 17 months away from his 21st birthday at the time of the certification decision. Although the presumptive adult sentence for the charged offenses is a 36-month stayed prison sentence, T.D.B. could be supervised on probation for a much longer period of time in adult court than in juvenile court. *See* Minn. Stat. § 609.135, subds. 1, 2 (2014) (stating that the court may stay imposition and order probation and that the stayed sentence shall not exceed “the maximum period for which

the sentence of imprisonment might have been imposed”); Minn. Stat. § 609.344, subd. 2 (2014) (indicating that the maximum sentence for each of T.D.B.’s offenses is five years’ imprisonment). On this record, the district court did not err in determining that a limited period of EJJ probation would not allow for adequate programming and supervision and therefore would not serve public safety.

T.D.B. also attacks Dr. Hertog’s credibility and argues that the district court assigned too much weight to the seriousness of the offense and the ability to punish, and not enough weight to rehabilitation. “On matters of credibility and the weight to be given the testimony of witnesses, [appellate courts] defer to the [district] court” when reviewing a district court’s certification order. *J.H.*, 844 N.W.2d at 39. The district court explained why it rejected Grace’s assessment and recommendations, and why it found Dr. Hertog credible, including that “the educational and clinical expertise of [Grace] is significantly less than the expertise demonstrated by Dr. Hertog.” We defer to this credibility determination.

As to the weighing of the public-safety factors, the district court’s explanation of its reasoning satisfies us that it appropriately balanced the factors. Despite T.D.B.’s lack of delinquency history and the likelihood that he can be rehabilitated, the district court did not err in finding that a limited term of supervision under EJJ probation would be inconsistent with public safety given the circumstances of this case. We therefore conclude that the district court did not abuse its discretion in weighing the factors and determining

that the state had met its burden of showing, by clear and convincing evidence, that retaining the proceeding in juvenile court would not serve public safety.

Affirmed.